

APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

Filed May 24, 2001

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1999 SESSION

FILED

February 17, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

JAMES P. STOUT,

Appellant.

C.C.A. NO. 02-001-9812-CR-00378

SHELBY COUNTY

HON. JOSEPH B. DAILEY,
JUDGE

(Capital felony murder; especially
aggravated robbery; especially
aggravated kidnapping)

FOR THE APPELLANT:

FOR THE APPELLEE:

ROBERT C. BROOKS

P.O. Box 771558
Memphis, TN 38177
(On appeal)

WILLIAM D. MASSEY

3074 East St.
Memphis, TN 38128
(On appeal and at trial)

DANESE K. BANKS

80 N. Monroe, Suite 1
Memphis, TN 38103
(At trial)

PAUL G. SUMMERS

Attorney General & Reporter

MICHAEL E. MOORE

Solicitor General

JOSEPH F. WHALEN

Asst. Attorney General
425 Fifth Ave. North
Nashville, TN 37243-0493

JOHN W. PIEROTTI

District Attorney General

JERRY HARRIS

LEE COFFEE

Asst. District Attomeys General
Criminal Justice Center - Third Floor
201 Poplar Ave.
Memphis, TN 38103

OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,

Judge

OPINION

[Deleted Summary of Facts and Testimony]

I. ALLEGED BATSON ERROR

On his ninth peremptory challenge, defendant struck juror Moore from the venire. The State objected to defendant's challenge, alleging a violation of Batson v. Kentucky, 476 U.S. 79 (1986). Following a lengthy hearing outside the presence of the venire, the trial court sustained the State's objection and reseated Moore on the panel. Defendant now challenges the trial court's ruling that he struck a juror for unconstitutional reasons.

In Batson, the United States Supreme Court held that, “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race.” 476 U.S. at 89. In Georgia v. McCollum, 505 U.S. 42 (1992), Batson was extended to prohibit defendants from striking jurors on the basis of their race. To trigger an analysis of a defendant's peremptory strike, the State must first establish a prima facie case that the juror is being challenged on the basis of his or her race. Georgia v. McCollum, 505 U.S. at 59. Once the State has done so, the defendant must then articulate a race-neutral reason for challenging the juror. Id. Once the defendant does so, the trial court must then determine whether the State has established purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 767 (1995).

In this case, defendant had exercised nine peremptory challenges in seven rounds. The first juror challenged was black; the remaining eight were white (defendant

is black). The State objected upon the defendant striking his eighth consecutive white juror. In finding that the State had established a prima facie case of racial discrimination, the trial court noted that the only black juror challenged by defendant was an employee of the Shelby County Correctional Center; that the remaining eight challenges had been against white jurors; and that in seven rounds of challenges, defendant had not once passed the jury. The court then directed defendant to articulate his race-neutral reason for excusing juror Moore.

Defense counsel responded that he challenged Moore because she was “not responsive;” was not making eye contact with him; that she appeared “very stern;” and that she was a teacher. Defense counsel stated that the predominant reason for the challenge was Moore's demeanor toward him. The court pointed out that a black teacher had not been challenged, and expressed doubt that Moore's demeanor was the type of race-neutral reason contemplated by Batson. Defense counsel denied knowing that the black juror he had not challenged was a teacher, and added that his challenge of Moore “had to do with [her] lack of responsiveness.” The court replied that Moore had responded to every question that she had been asked by the court, by the State, and by defense counsel. Finally, defense counsel stated his concern that Moore taught at the school which defendant had attended, and that the facts of the case might reflect badly on her school. He also noted, however, his reliance on his “experience and instinct” as trial counsel.

The court responded that,

viewing the jurors that have been excused by the defense, the answers they've given, the employment they have, the lack of red flags, if you will, that exist in this case with regard to the

answers they've given with regard to being married to a police officer or being the recent victim of a violent crime or anything of that sort, leads one to conclude, I think a person would have to be blind if they didn't start looking real skeptically at why exactly these eight people have been challenged.

It sure starts to look like they're being challenged because they're Caucasian. . . . There've been eight in a row without any real articulable reason other than some vague general statements and conclusions.

. . . .

And at this point, unless there can be some further reason articulated to convince me otherwise, I am not satisfied that the reasons given sufficiently articulate a race neutral explanation for [Moore] being challenged.

Defendant contends that the trial court erred by not accepting his proffered race-neutral reasons at face value and then requiring the State to prove purposeful discrimination. He argues that the trial court completed only the first two steps of the Batson analysis, and that he is therefore entitled to a new trial. We respectfully disagree.

Defendant relies heavily on Purkett v. Elem, 514 U.S. 765 (1995). In that case, the defendant objected to the prosecutor's use of peremptory challenges to strike two prospective black jurors. In response, the prosecutor explained that he didn't like their haircuts or their facial hair. The trial court overruled the defendant's objection without explanation. On eventual appeal in federal court, the Court of Appeals for the Eighth Circuit concluded that the trial court had erred.¹ The Court of Appeals held that the prosecutor had not articulated a legitimate race-neutral reason for the strikes.

¹The case was being appealed on defendant's petition for writ of habeas corpus.

The U.S. Supreme Court reversed the Court of Appeals, finding that it (not the trial court) had erred by requiring that the race-neutral reason articulated by the proponent of the strike be at least plausible. It found that the trial court had properly proceeded to the third part of the inquiry, in which it ruled that the prosecutor was not motivated by discriminatory intent. The Supreme Court found that the Court of Appeals had erred in its review of the trial court's decision because it "did not conclude or even attempt to conclude that the [trial] court's finding of no racial motive was not fairly supported by the record. . . . It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility." Id. at 769. In effect, the Court of Appeals was impermissibly substituting its judgment for that of the trial court, and improperly adding a requirement to the second step of the Batson analysis.

This case is distinguishable from Purkett. We are not reviewing an appellate court's decision to substitute its findings of fact for those of the trial court. Rather, we are reviewing the trial court's lengthy findings after it heard substantial argument on this issue from both the State and the defendant. Cf. U.S. v. Tucker, 90 F.3d 1135, 1142 (6th cir. 1996) (where proponent of strike provided an inherently believable explanation and the opponent offered no rebuttal, the trial court did not commit clear error in overruling the opponent's objection). The issue is whether the State established by a preponderance of the evidence that defendant's strike of Moore was intentionally discriminatory. Id. We acknowledge that some of the trial court's language in this case appears to indicate that it simply rejected a facially race-neutral explanation offered by the defendant. Cf. Purkett v. Elem, 514 U.S. at 768 (The race-neutral explanation need not be persuasive, or even plausible. Unless a racially discriminatory intent is inherent in the proponent's explanation,

the reason offered will be deemed race neutral.) However, despite the imprecise phraseology used by the trial court, the record makes clear that the court engaged in the required in-depth analysis of all the circumstances before reseating Moore on the jury, and did not impermissibly shift the burden of persuasion to the defendant. The court took pains to articulate its findings on the record, and it had the opportunity – which we do not – to assess the demeanor of the prospective juror and defense counsel, and to evaluate their credibility. On appeal, this Court accords great deference to the trial court's findings, and will not set them aside unless clearly erroneous. State v. James E. Hathaway, No. 02C01-9702-CR-00082, Shelby County (Tenn. Crim. App. filed Dec. 30, 1997, at Jackson), perm. appeal denied (Tenn. 1998). See also State v. Butler, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990) (where a trial court's findings upon a Batson challenge are based on the credibility of witnesses, the standard of review is whether the trial court's decision was clearly erroneous).

We find this Court's analysis in State v. James E. Hathaway to be instructive:

Although a trial court must accept a facially race-neutral explanation for purposes of determining whether the proponent has satisfied his burden of production, this does not mean that the court is bound to believe the explanation in making its [final] determination. In other words, while the court may find that a proffered explanation is race-neutral, the court is not required, in the final analysis, to find that the proffered explanation was the actual reason for striking the juror. If the court determines that a race or gender based motive was behind the challenge, the juror may not be excluded.

In making its determination, the trial court must look to the totality of the circumstances for rarely will a party admit that its purpose in striking a juror was discriminatory. Accordingly, the trial court may infer discriminatory intent from circumstantial evidence. <The factfinder's disbelief of the reasons put forth by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with

the elements of the prima facie case, suffice to show intentional discrimination, and . . . no additional proof of discrimination is required.' Additionally, the court may consider whether similarly situated members of another race were seated on the jury or whether the race-neutral explanation proffered by the strikes' proponent is so implausible or fantastic that it renders the explanation pretextual. The trial court may also consider the demeanor of the attorney who exercises the challenge which is often the best evidence of the credibility of his proffered explanations.

(emphasis added) (citations omitted). See also U.S. v. Ledford, 127 F.3d 1103, 1997 WL 659673 (6th Cir. 1997) (trial court "has the power to disbelieve even a race-neutral explanation offered by the prosecution").

The record supports the trial court's ruling in this case. Defendant struck eight white jurors consecutively. See Batson, 476 U.S. at 97 ("a pattern' of strikes against . . . jurors [of a particular race] . . . might give rise to an inference of discrimination.") The only black juror defendant struck worked for the Division of Corrections. The defendant's explanation for striking Moore rested primarily on Moore's demeanor, and the trial judge was in a much better position to evaluate both Moore's demeanor and defense counsel's credibility than is this Court. The trial judge's findings are not clearly erroneous, and this issue is therefore without merit.

[DELETED: II. CORROBORATION OF ACCOMPLICE TESTIMONY]

III. TRIAL COURT'S RULINGS ON PROFFERED DEFENSE PROOF

Defendant complains that the trial court repeatedly stymied his attempts to present his theory of defense, thereby violating his constitutional rights.² Defendant's theory was that he had once been a member of the Gangster Disciples gang, but had been "beaten out" of it in 1993 while he was in jail. As a result, he became an outsider and scapegoat for gang activity. Defendant wanted to prove that gang members Bowers, Gandy and Jordan actually committed the kidnapping, robbery and murder of Hunter; that lower ranking gang members Carmichael and Terrell agreed to "take the rap" for Bowers and Gandy; and that they all agreed to point the finger at him, the outsider, as the actual perpetrator of the crimes. In support of his theory, defendant wanted to introduce the initial statements that Bowers and Gandy made to the police, in which they claimed to have been present at the scene; the testimony of Makimba Fowler, a Gangster Disciple member who had been in jail with defendant and was familiar with the "beating out" ritual practiced by the gang; an incident report prepared by jailer Donald Justus after defendant got a black eye in 1993; and the testimony of Carl Nelson, an expert on gangs and gang-related activities, who would have testified about the gang practices of blaming crimes committed by gang members on non-members, and of lower-ranking gang members stepping forward to accept the consequences of higher-ranking members' activities.

Defendant initially ran into trouble presenting his theory of defense during opening statement. When his lawyer referred to his mother giving him to his grandmother at two weeks of age, the State objected. There followed a long discussion outside the jury's presence, during which defense counsel described in some detail both

²Defendant cites to the Sixth and Fourteenth Amendments to the United States Constitution, and to Article I, Sections Eight and Nine of the Tennessee Constitution.

the theory of defense and the supporting proof. While reserving its evidentiary rulings, the court expressed concern over the admissibility of much of the proffered proof. Eventually, the court ruled that events occurring in June 1993 were too remote in time to be relevant to defendant's actions in November 1995:

Even if [defendant had been beaten out of the gang in 1993], he could have been in and out of the gang ten more times between June of '93 and November of '95. He could have had a dozen different meetings with gang members of ten different gangs. And who knows what he could have done during those two and a half years that -- what intervening circumstances might have made the '93 incident totally irrelevant to the '95 activity.

Accordingly, the court ordered defendant to confine his opening statement to the events that related to Amber Hunter's killing on November 8, 1995.

The trial court also ruled that defense counsel should not refer during opening statement to Gandy and Bowers' initial statements to the police, in which they admitted participating in the events leading to Hunter's death. Defense counsel wanted to introduce these statements via the police reports containing them. The State pointed out the hearsay problem with this proof,³ and the trial court inquired whether counsel intended to call Bowers and Gandy to the stand. Defense counsel refused to commit to calling these witnesses. The trial court ruled that no mention should be made of these statements during opening statement unless counsel planned to call Bowers and Gandy to testify.

³Police reports are hearsay and not admissible under the public records exception to the hearsay rule. Tenn.R.Evid. 801; 803(8).

Our Supreme Court has held that opening statements “are intended merely to inform the trial judge and jury, in a general way, of the nature of the case and to outline, generally, the facts each party intends to prove.” Harris v. Baptist Memorial Hospital, 574 S.W.2d 730, 732 (Tenn. 1978) (emphasis added). In a trial, facts can be proven only by admissible evidence. Opening statements should not be used by either side as opportunities to present speculation and conjecture which is unsupported by admissible proof. And while a trial court should not make evidentiary rulings during opening statement, it may use its discretion to exclude from opening statements assertions which it deems unlikely to be supported by admissible evidence. Absent an abuse of that discretion, this Court will not overturn a trial court's ruling in that regard. See State v. Kimberly Wolfe, C.C.A. No. 122, Sevier County (Tenn. Crim. App. filed Mar. 13, 1991, at Knoxville), perm. appeal denied (Tenn. 1991) (standard governing trial court's control of both opening statement and closing argument is abuse of discretion). We find no such abuse of discretion here. This issue is without merit.

Defendant also complains that the trial court improperly limited his cross-examination of Officer Hightower. On November 20, 1995, Hightower took statements from Bowers and Gandy. After taking these statements, Hightower noted in his report that “both statements from Bowers and Gandy provided numerous details that only parties responsible could have known.” When defense counsel asked Hightower about this notation, the State objected. The court sustained the objection on the grounds that defense counsel was attempting to ask about the content of Bowers and Gandys' statements, which was hearsay. See Tenn. R. Evid. 801.

The trial court should have allowed defense counsel to ask Hightower about his own conclusions regarding his investigation of the case. Such questions, properly asked, would not have called for hearsay. However, the trial court's error in this regard was harmless. While Hightower may have initially concluded that Bowers and Gandy had been involved in the crimes against Hunter, subsequent events led the State to conclude that they were not. Hence, they were not charged in the indictments. Had Hightower been allowed to testify about his initial conclusions, the State would have been entitled to question him about whether and why he later changed those conclusions. Viewing the record as a whole, we do not find that the trial court's error in this regard more probably than not affected the judgment or resulted in prejudice to the judicial process. See Tenn. R. App. P. 36(b). Accordingly, this issue is without merit.

Defendant also complains that the trial court erred in ruling that the proffered testimony of Makimba Fowler, Carl Nelson and Lieutenant Justus was inadmissible. He claims that the court's ruling prevented him from proving that he had been beaten out of the Gangster Disciples in 1993, thereby becoming an outsider to be used as a "throwaway" and framed for the crimes committed by other gang members against Amber Hunter. We respectfully disagree.

According to defense counsel's statements to the court during the guilt phase of the trial, Fowler was with defendant in jail in June 1993, but did not remember seeing defendant being beaten. All Fowler could testify to, according to defense counsel, was that Gangster Disciple members would expel other members by throwing a sheet

over their head and beating them.⁴ Lieutenant Justus was one of defendant's jailers in June 1993, and prepared a report when defendant appeared with a bruised eye and was sent to the medical department. Justus did not see how defendant got the bruised eye. Nelson was proffered as an expert in Gangster Disciple activities, familiar with the gang practice of blaming non-members for crimes committed by members.

The trial court correctly ruled that this proof was irrelevant absent some proof that defendant had been beaten out of the gang, and remained an outsider at the time Amber Hunter was kidnapped, robbed and murdered. According to defense counsel, Fowler could not testify to this; nor could Justus; nor could Nelson. All they could testify to was that defendant got a black eye while he was in jail; that members of the Gangster Disciples expelled other members through beatings; and that gang members blamed non-members for their own criminal activity. There was simply no proof proffered or admitted during the guilt phase of the trial that defendant had been subjected to this treatment. Indeed, the only evidence admitted during the guilt phase of the trial regarding defendant's gang affiliation was to the contrary. Officer Hightower testified that when he initially questioned defendant on November 21, 1995, defendant admitted to being a member of the Gangster Disciples. Jordan also testified that defendant was a member of the gang. If the uncontroverted proof established that defendant was a member of the gang in November 1995, any proof regarding what happened to non-members was utterly irrelevant. Irrelevant evidence is inadmissible. Tenn. R. Evid. 402.

⁴At the sentencing hearing, Fowler testified that he did remember seeing defendant being beaten out of the Gangster Disciples gang. Fowler also testified that he had never before spoken with defense counsel, and defense counsel expressed surprise at Fowler's testimony.

Thus, the trial court did not err in its ruling on the proffered proof, and this issue is without merit.

Defendant next alleges that, after the trial court prevented him from proving his theory of defense, the State was permitted to point out his lack of evidence during closing argument, thereby impermissibly shifting the burden of proof to him. The State disagrees.

Defense counsel maintained during closing argument that defendant was being blamed as the “new kid on the block,” and that the witnesses’ stories were inconsistent because two of them hadn’t actually been at the crime scene. He argued that the witnesses testified in order to get favorable plea bargains; that the State elicited testimony “needed to point the finger at [defendant] . . . like all the Gangster Disciples want . . . [b]ecause it solves the case;” and that “[t]he State’s case is built on the shifting sands of these people’s lies.”

On rebuttal, the State responded that, “the problem with [defense counsel’s] whole theory, his whole argument, is that he hasn’t given you any proof of anything. . . . Not one scintilla of proof that indicates that what he just told you is true.” On defendant’s objection that the State was arguing that defendant had a burden of proof to meet, the court ruled that the State’s argument was proper rebuttal.

The trial court has wide discretion in controlling the argument of counsel. Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975). This Court will not interfere with the exercise of that discretion absent an abuse thereof. Id. We see no such abuse here.

The State's rebuttal argument did not impermissibly shift the burden of proof to defendant. Rather, it was merely comment on the evidence in the record (or not). The jury was instructed that the argument of counsel was not evidence, and that the State bore the burden of proving its case beyond a reasonable doubt. The jury is presumed to follow its instructions. State v. Blackmon, 701 S.W.2d 228, 233 (Tenn. Crim. App. 1985). This issue is without merit.

IV. TRIAL COURT'S REFUSAL TO REVIEW STATEMENT

Defendant contends that the trial court erred by refusing to conduct an in camera review of Harold Gray's statement. Gray made his statement to the police on November 25, 1995, after Bowers' and Gandy's first statements. Defendant theorized that the police had "collaborated with each other," taking information from Bowers' and Gandy's initial statements and "roll[ing] over a lot of what they said into everybody else's statements." Defendant argued that his theory would be supported if "that same verbiage appears in subsequent statements." Thus, defendant requested the court under Brady v. Maryland, 373 U.S. 83 (1963), to examine Gray's statement for evidence of the alleged police subterfuge. The trial court refused after the State represented that the statement did not include anything "that would be even arguably exculpatory."

The defendant cites us to no Tennessee authority for the proposition that the trial court abused its discretion by refusing to review the statement, and we decline to hold that it did so. Moreover, out of an abundance of caution in this capital case, this Court has reviewed Gray's statement. It contains no information which would have required its disclosure to defendant under Brady (or which supports defendant's theory). This issue is without merit.

V. & VI. ADMISSIBILITY OF DEFENDANT'S PRIOR CONVICTION

A. As impeachment evidence

In 1993, defendant was convicted of theft of property, reckless endangerment, and two aggravated burglaries. He was also convicted in January 1997 of especially aggravated robbery. This conviction arose out of an armed carjacking that defendant committed with Bowers and Gandy⁵ against Walter Bush on November 11, 1995, in Memphis. Prior to trial, the court conducted a hearing to determine whether the State could use any of these convictions to impeach the defendant's credibility if he testified. See Tenn. R. Evid. 609(a)(3). The court ruled that the State could not refer to the reckless endangerment conviction, but would be allowed to refer to the other four convictions. Defendant now argues that the trial court erred in its ruling on the especially aggravated robbery conviction.

A prior conviction may not be used for impeachment purposes if the unfair prejudicial effect of the conviction on the substantive issues outweighs its probative value on the accused's credibility. Tenn. R. Evid. 609(a)(3). Defense counsel argued that the prior conviction was so similar in nature to the instant offense that the prejudicial effect outweighed the probative value. The trial court disagreed, finding that “the probative value is substantial in light of the nature of the offense and how recent in time it is.”

When conducting the balancing test required by 609(a)(3), the trial court should first analyze the relevance of the prior conviction to the accused's credibility.

⁵Bowers and Gandy each pled guilty to aggravated robbery in connection with this offense.

State v. Mixon, 983 S.W.2d 661, 674 (Tenn. 1999). If the conviction is probative of the accused's credibility, then the trial court should assess the similarity between the crime underlying the prior conviction and the crime which is being tried. Id. Where the two are substantially similar, the court “should carefully balance the probative value of the impeaching conviction on credibility against its unfairly prejudicial effect on substantive issues.” Id.

Contrary to defendant's assertions, the trial court in this case did “carefully balance” the necessary criteria. It correctly determined that especially aggravated robbery is a crime of dishonesty, and is therefore probative of the defendant's credibility. See, e.g., State v. Goad, 692 S.W.2d 32, 37 (Tenn. Crim. App. 1985). We further agree with the trial court that, because the crime underlying this prior conviction was more recent in time to the trial than the 1993 offenses, the probative value of this prior conviction was enhanced. The trial court correctly acknowledged that the similarity between the two crimes had to be considered in the balancing process, but further correctly noted that similarity does not automatically preclude using the prior conviction. See State v. Blevins, 968 S.W.2d 888, 893 (Tenn. Crim. App. 1997).

We review the court's decision on this issue for abuse of discretion. Id. at 892. No abuse of discretion having been shown, this issue is without merit.

B. As substantive evidence

After the State concluded its case in chief, defendant indicated that he intended to call Bowers and Gandy to testify. Defendant wanted to question Bowers and Gandy about their initial statements in which they admitted being present during the

attack on Hunter. By calling these witnesses, defendant wanted to advance his theory of being taken along by Gangster Disciples in order to be blamed for their own criminal activities. Defense counsel renewed a motion in limine to prevent the State from questioning these witnesses about the Bush carjacking. The State opposed defendant's motion, arguing it should be allowed to rebut defendant's proof with evidence of his continued participation in activities with these alleged gang members. Defendant now contends that the trial court erred in denying his motion in limine.

Prior to ruling, the trial court held a jury-out hearing pursuant to Tennessee Rule of Evidence 404(b), which provides

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

The court heard lengthy argument from counsel; the testimony of Bowers; an offer of proof of the victim Bush's testimony; and reviewed the statement defendant made in the Bush carjacking. The court then found that the two crimes were sufficiently identical to support the inference that the defendant had been involved in both of them. It further found the existence of material issues other than conduct conforming to a character trait, to wit: identification of who shot Amber Hunter; intent; and guilty knowledge. Finally, the

court found that the probative value of this proof “clearly outweigh[ed] any prejudicial effect.”

The trial court complied substantially with the procedural requirements of 404(b). Accordingly, this Court reviews its ruling for abuse of discretion. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). We find no such abuse.

We agree with the trial court that the Bush carjacking was substantially identical to the attack on Hunter. Bowers testified that he, Gandy and defendant drove up beside Bush as he sat in his parked car. Defendant got out of the car they were in and made Bush get out of his car. Bowers then got in the victim's car while Gandy stayed in the original vehicle. While Bowers sat in the victim's car, he heard a gunshot. Defendant then returned to the car Gandy was driving, and with Bowers following in the victim's car, they all returned to the Springcreek apartments. Bowers abandoned Bush's car there. The offer of proof of Bush's testimony established that Bush had parked his car at about five o'clock in the morning. Defendant and either Gandy or Bowers approached him, both of them armed. Defendant shot him in the neck as he tried to run, and the men then took his car.

According to defendant's statement, he was riding with Bowers and Gandy when they pulled up beside Bush's car. He and Bowers approached Bush as he was leaving his vehicle, and Bowers told him to drop the keys. Bowers stated to Bush that he had seen his face, and Bush tried to run. According to defendant, Bowers then shot Bush. Defendant returned to the original car, and Bowers got into Bush's car. Bowers

followed them back to the Springcreek apartments. Defendant admitted in his statement that he was an “inactive member” of the Gangster Disciples.

The identity of Hunter's shooter was the key issue in this case. Given the similarity of the Bush carjacking with Hunter's attack, proof of this other crime was relevant to prove that the same person pulled the trigger both times. “An inference of identity arises when the elements of the [other] offense and the charged offense are sufficiently distinctive that one can conclude that the person who committed the [one] also committed the [other].” State v. Electroplating, Inc., 990 S.W.2d 211, 224 (Tenn. Crim. App. 1998). “[I]t is not required that the other crime be identical in every detail to the offense on trial. The evidence must support the inference that the defendant, who committed the [other] acts, is the same person who committed the offense on trial.” Id. (citations omitted). Thus, proof of the Bush carjacking was properly admitted to prove identity.

It was also properly admitted to show defendant's guilty knowledge and intent. Defendant maintained that he was present when Hunter was kidnapped, robbed and killed, but that he did not have any knowledge that these crimes were going to be committed, and that he did not intend for these crimes to occur. That he was out riding around with the very same people he claimed committed the Hunter crimes just a few hours later, during which a strikingly similar crime was committed, serves to undercut his protestations of innocent presence.

This issue is without merit.

[DELETED: VII. ADMISSION OF HEARSAY STATEMENTS]

VIII. DEFENDANT'S THREAT AGAINST WITNESS

On cross-examination, defense counsel asked Woodall if she had been “forced to testify;” if she had been threatened with criminal charges if she didn't make a statement to the police about the Hunter crimes; and whether she had been threatened “to make [her] testify” at the trial. Woodall responded that only God had forced her to testify; that she had been threatened with criminal prosecution if she did not make a statement to the police; but that no one had threatened her to make her testify. On redirect, the State inquired as to whether anyone from the prosecution had threatened her in order to make her testify, and Woodall responded in the negative. The State then asked her if she was scared. She responded, “Yes, I am,” and the State asked of whom she was afraid. Woodall replied that she was afraid of defendant because of threats he had made against her and her family if she testified.

Defense counsel objected on the grounds that this aspect of redirect exceeded the scope of his cross-examination. He argued that he had only explored threats made by the State in order to intimidate Woodall into testifying against the defendant; that he had not broached the subject of threats by anyone else. The court found that defense counsel's line of questioning implied that someone from “the system” had forced her to testify, and ruled that the State was entitled to rebut defense counsel's implication, “to the extent that they have proof.” Defendant now contends that the trial court's ruling was in error.

We respectfully disagree. As candidly noted by defendant in his brief, defense counsel was implying through his cross-examination of Woodall that she “was testifying falsely against the defendant because she had been threatened by the prosecutors or the police.” In other words, defense counsel was attacking the witness' credibility. The State was therefore entitled to rehabilitate Woodall's credibility. We think it bolstered Woodall's credibility when she admitted to testifying against defendant in spite of his alleged threats against her and her family. Accordingly, the question was appropriate and, contrary to defendant's contentions in his brief, relevant. “[T]he scope of redirect examination is within the sound discretion of the trial court, which will not be reversed absent an abuse of that discretion.” State v. Barnard, 899 S.W.2d 617, 624 (Tenn. Crim. App. 1994). No such abuse is apparent here, and this issue is therefore without merit.

[DELETED: IX. USE OF DEFENDANT'S PRIOR CONVICTIONS DURING PENALTY PHASE]

X. USE OF SUBSEQUENT CRIME AS AGGRAVATOR

Defendant next contends that the use of his prior conviction for the Bush carjacking as an aggravating circumstance is unconstitutional. He argues that, because the offense occurred after the instant crimes, its use as an aggravator constitutes due process and ex post facto violations. We respectfully disagree.

Our Supreme Court has recently reiterated its oft-repeated holding that, “so long as a defendant is convicted of a violent felony prior to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable.” State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997) (emphasis in original). In State v.

Nichols, 877 S.W.2d at 736, the Court specifically rejected the defendant's contention of a due process violation, even where the prosecutor admitted that the defendant's multiple trials had been ordered in such a way as to create an additional aggravating circumstance. And in State v. Caldwell, 671 S.W.2d 459, 465 (Tenn. 1984), the Court specifically rejected the argument that a prior conviction based on a subsequent crime permitted an ex post facto law. This issue is therefore without merit.⁶

[DELETED: XI. EXCLUSION OF EVIDENCE]

[DELETED: XII. ADMISSION OF FACTS UNDERLYING PRIOR CONVICTION]

XIII. CONSTITUTIONALITY OF TENNESSEE'S DEATH PENALTY STATUTES

Defendant argues that the Tennessee death penalty statutes are unconstitutional under both the United States and Tennessee constitutions.⁷ Specifically, he argues that our statutes fail to meaningfully narrow the class of death eligible defendants; that the death sentence is imposed capriciously and arbitrarily; that electrocution is cruel and unusual punishment; and that the appellate review process in death penalty cases is constitutionally inadequate. Our Supreme Court has previously rejected these arguments, and so, therefore, must we. See, e.g., State v. Nesbit, 978

⁶We are puzzled by defendant's assertion in his brief that, "[a]t the time of [Hunter's] murder, the notice that [he] had was clear: he only faced life imprisonment." Besides finding that defendant had been convicted of a prior violent felony, the jury found two additional aggravating circumstances: that defendant committed the murder to prevent his arrest and/or prosecution, and that he committed or aided the murder while he had a substantial role in committing the robbery or kidnapping. Both of these aggravators arose simultaneously with the murder, and defendant therefore "had notice" when he pulled the trigger that he faced the death penalty.

⁷Defendant refers to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and to Article I, Sections Eight, Nine, Sixteen and Seventeen, and Article II, Section Two of the Tennessee Constitution.

S.W.2d 872 (Tenn. 1998), cert. denied, 119 S.Ct. 1359 (1999), affirming State v. Clarence C. Nesbit, C.C.A. No. 02C01-9510-CR-00293, reported at 978 S.W.2d 897; and State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998), cert. denied, 119 S.Ct. 343 (1998), affirming State v. Perry A. Cribbs, C.C.A. No. 02C01-9508-CR-00211, reported at 967 S.W.2d 792. This issue is without merit.

XIV. CUMULATIVE ERROR AND WAIVER OF ERROR

Defendant contends that the cumulative effect of errors committed during the penalty phase of his trial require a reversal of his death sentence and a new sentencing hearing. We respectfully disagree. We have carefully reviewed the record and considered the errors assigned by defendant, and have determined that none of them, either individually or cumulatively, constitute prejudicial error requiring reversal. This issue is without merit.⁸

[DELETED: XV. STATUTORY REVIEW OF SENTENCE]

[DELETED: XVI. APPLICABILITY OF FELONY MURDER AGGRAVATOR]

Defendant's convictions and sentences are affirmed.

JOHN H. PEAY, Judge

⁸Defendant also contends that, while the State argues that he has waived certain issues, the usual waiver rules should not apply to issues which relate to the reliability of the death sentence. Since we have addressed all of defendant's assignments of error on the merits, we deem it unnecessary to address this contention.

CONCUR:

NORMA McGEE OGLE, Judge

ALAN E. GLENN, Judge